PORT KELANG AUTHORITY v. DATIN PADUKA PHANG OI CHOO; TAN SRI DATUK G GNANALINGAM & ORS (THIRD PARTY)

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[SUIT NO: 22-1500-2009]
7 NOVEMBER 2016

CIVIL PROCEDURE: *Stay of proceedings – Application for – Concurrent civil and criminal proceedings – Whether in respect of same subject matter – Whether civil proceedings ought to be stayed pending disposal of criminal proceedings – Inordinate delay in applying for stay – Whether fatal to application – Whether there was substantial similarity between two proceedings to justify stay – Whether there were special circumstances – Whether there was real risk of prejudice or irreparable harm – Whether application for stay trial bona fide – Balance of justice – Whether tilted in favour of granting order for stay*

The defendant, *via* encl.79, applied for a stay of the full trial of the present civil suit pending the disposal of criminal proceedings ('criminal proceedings') that the defendant currently faced in the Sessions Court, where the defendant was charged with committing the offence of criminal breach of trust under s. 409 of the Penal Code ('PC').The plaintiff ('PKA') had commenced a claim against the defendant ('civil proceedings') alleging, amongst others, that the defendant had breached her fiduciary and/or common law duties to PKA. The defendant was sued in her capacity as the general manager and board member of PKA. There were 15 allegations of breaches brought against the defendant, pertaining to the decisions made in respect of the Port Kelang Free Zone Project ('PKFZ Project'). Some of the breaches complained of by PKA were pertinent and relevant to the determination of encl. 79. According to the defendant, there were concurrent civil and criminal proceedings involving the defendant in respect of the same subject matter which would potentially involve calling the same witnesses and having to produce the same documents before the court. In contending that there were special circumstances warranting the stay order to be granted, the defendant relied on the following instances: (i) the factual matrix was very similar, if not identical, in the civil and criminal proceedings; (ii) the defendant would lose her basic and inherent right to silence in relation to the concurrent criminal proceedings; (iii) the defendant's evidence in the civil suit would potentially incriminate her in the court of the criminal proceedings' trial; and (iv) the lack of important documents in the civil suit would seriously prejudice the defendant's interest. The plaintiff, on the contrary, contended that: (i) there was an inordinate delay by the defendant in filing the stay application; (ii) there was no substantial similarity in the civil suit and the criminal proceedings; and (iii) there was no real prejudice to the defendant.

Held (dismissing application with costs):

(1) The stay application was filed six years after the plaintiff had instituted the civil suit, which was long after the pleadings had closed between the plaintiff and the defendant and between the defendant and the third parties ('TPs'). If the defendant felt that her right to remain silent in the criminal trial would be seriously prejudiced, she should have filed the application immediately, whether on or before or after filing her defence. An unexplained delay in applying for a stay was regarded as fatal to the application wherein the court should not exercise its discretion to grant the stay under the circumstances. (para 25)

(2) As to the question of substantial similarity between the two proceedings (civil and criminal), the onus was on the defendant to show a substantial overlap between the facts, allegations and reliefs in the statement of claim ('SOC') and the charges brought against the defendant in the criminal proceedings. A minimum overlap would not suffice to make the drastic order of completely staying the trial of the civil claim. The three criminal charges against the defendant were only mentioned in paras. 18.1 to 18.2 of the amended SOC which related only to one of the 15 alleged breaches alleged against the defendant. The crux of the 15 alleged breaches concerned primarily her contractual, fiduciary and/or common law duties during her tenure as general manager of the plaintiff, which covered a substantially wider spectrum than the three criminal charges for the offence of criminal breach of trust. The defendant had only been able to show that some facts in the criminal proceedings may be relevant to the civil suit which would, in principle, be insufficient to justify a stay of proceedings. The facts were substantially more than as well as in substance different from the criminal proceedings. (paras 29, 30, 34 & 36)

(3) Although the criminal trial had commenced, only two witnesses had been called to date and subsequent trial date had been vacated for reasons unknown. The slow progress of the criminal proceedings which the facts clearly disclosed could impede the fair disposal of the civil suit to the plaintiff's prejudice. To estimate when the trial would be concluded would be a most difficult task and based on the current progress and postponements, it was likely to take several years. The question of unfairness and prejudice to the plaintiff in the event that the stay is granted remained as this civil suit was instituted way back in 2009. (para 39)

(4) Further, s. 147 of the Evidence Act 1950 was of general application to witnesses in a civil suit who are entitled to protection under s. 132 where they are compelled to answer any question relevant to the suit. In light of the protection afforded to the defendant by s. 132 should she

be required to testify in the civil suit, the question of being exposed to criminal prosecution resulting from the evidence given did not arise at all and had no basis. (paras 41 & 42)

(5) The defendant had failed to discharge the onus of demonstrating that there were special and/or exceptional circumstances that would justify the court in exercising its discretion to grant the stay that the defendant sought or that there was a real risk of prejudice or irreparable harm to the defendant if the order was refused. The balance of justice tilted in favour of the order not being granted in view of the interference with the right of the plaintiff to proceed with the suit in the normal course. Further, this attempt to stay the trial had not been shown to be *bona fide* as there was clearly no substantial similarity between this civil suit and the pending criminal action against the defendant that would pose a real and substantial prejudice or risk to her in the latter proceedings. This application thus had no merits on the facts and principle. (paras 45-47)

Case(s) referred to:
Dato' Ding Lian Cheon v. Yap Yon Jee & Ors [1999] 8 CLJ 98 ***(refd)***
Jefferson Ltd v. Bhetcha [1979] 1 WLR 898 ***(refd)***
Leong Ken Min & Anor v. Pelangi Kurnia Sdn Bhd & Anor [1999] 1 LNS 156 HC ***(refd)***
Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***
MCAT Gen Sdn Bhd v. Celcom (M) Bhd (No 2) [2007] 10 CLJ 375 HC ***(refd)***
Philippine Airlines v. Goldair (Aust) Pty Ltd & Ors [1990] VR 385 ***(refd)***
RHB Bank Bhd v. Tan Khay Guan [2009] 8 CLJ 612 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 132, 147
Penal Code, s. 409

For the plaintiff - K Siva Kumar & Natalie Ooi; M/s Skrine
For the defendant - Mathew Thomas Philip, K Lavinia & Mavinthra Jothy; M/s Thomas Philip
For the 1st third party - P Jeyakumar & Nur Hidayah Said, M/s Zahir Jeya & Zainal
For the 2nd to 6th, 8th, 11th to 24th & 26th third parties - Jyotsana Doshi; M/s Abdullah & Zainudin

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JC:

[1] This judgment is in respect of the defendant ('D')'s notice of application ('N/A') dated 12 May 2015 (encl. 79) for a stay of the full trial of the present civil suit pending the disposal of criminal proceedings that D currently faces in the Klang Sessions Court which was commenced in 2009.

A **Brief Facts**

[2] The relevant background facts to the plaintiff ('P')'s claim are well summarised in D's written submission which I adopt, as follows:

The Plaintiff's Claim

B In the present action ('Civil Proceedings'), the Plaintiff ('PKA') has commenced a claim against the Defendant alleging, amongst others, that the Defendant had breached her fiduciary and/or common law duties to PKA

(1) The Defendant is sued in her capacity as the General Manager and
C Board member of PKA.

(2) Based on the Amended Statement of Claim, there are 15 allegations of breaches brought against the Defendant, pertaining to the decision(s) made in respect of the Port Kelang Free Zone Project ('PKFZ Project')

D Amongst the breaches complained of by PKA, the following breaches are pertinent and relevant to the determination of Enclosure 79:

(1) That the Defendant had agreed to the proposed revision works to be carried out to the Monsoon Drain and Water Supply system amounting to RM254,850.00 which had the effect of causing the
E said sum to be paid to KDSB; and

(2) The Defendant had failed to query KDSB on the status of Infrastructure Work carried out, thereby causing PKA to make payment in the sum of RM138,767,000.00 based on the Notice of Payment issued by KDSB.

F **Grounds In Support Of Enclosure 79**

[3] There are concurrent civil and criminal proceedings involving the defendant in respect of the same subject matter;

(a) the criminal proceedings have commenced with two prosecution
G witnesses already being called; and

(b) trial dates for the criminal proceedings have been fixed, all of which are fixed for 2015.

[4] The civil and criminal proceedings involve the same factual matrix
H which will potentially involve calling the same witnesses and having to produce the same documents before this court;

[5] In the event the civil proceedings are allowed to take place and proceed before the trial of the criminal proceedings are fully and finally adjudicated and disposed of, the defendant will lose her right to remain silent
I and not give evidence until her defence is called upon in the criminal proceedings;

[6] Any evidence the defendant gives in the civil proceeding could potentially be incriminating and used in the course of the criminal proceedings' trial;

[7] There is a real danger of the causing of injustice to the defendant that will lead to a potential miscarriage of justice on the criminal proceedings;

[8] As criminal proceedings are currently ongoing, copies of original documents that are potentially relevant to the civil suit are being utilised in the proceedings therein and consequently the same will not be available to be put before this court during the trial of the civil suit.

[9] There is also a strong likelihood that the civil proceedings would attract extensive publicity which could further undermine the defendant's defence in the criminal proceedings; and

[10] There are special circumstances and the balance of justice warrants a stay of proceedings of the plaintiff's claim in this suit against the defendant.

Criminal Charges Against The Defendant

[11] The criminal charges brought against the defendant at the Shah Alam Session around 10 December 2009 are as follows:

(1) Bahawa kamu, di antara 1 Oktober 2004 dan 5 September 2005 di Lembaga Pelabuhan Kelang, Jalan Pelabuhan Utara, Pelabuhan Kelang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan sebagai seorang ejen iaitu Pengurus Besar Lembaga Pelabuhan Kelang dan dalam kapasiti tersebut telah diamanahkan dengan penguasaan ke atas dana di dalam akuan Disbursement No. 21423100033928 di RHB Bank Berhad, Plaza OSK, Jalan Ampang Kuala Lumpur berjumlah RM98,700,000.00 telah melakukan pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan;

(2) Bahawa kamu, di antara 30 September 2005 dan 9 Mei 2006 di Lembaga Pelabuhan Kelang, Jalan Pelabuhan Utara, Pelabuhan Kelang, di dalam Daerah Kelang, di dalam Negeri Selangor Darul Ehsan sebagai seorang ejen iaitu Pengurus Besar Lembaga Pelabuhan Kelang dan dalam kapasiti tersebut telah diamanahkan dengan penguasaan ke atas dana di dalam akaun Disbursement No. 21423100033928 di RHB Bank Berhad, Plaza OSK, Jalan Ampang Kuala Lumpur berjumlah RM 21,6000,000.00 telah melakukan pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan; dan

(3) Bahawa kamu, di antara 30 September 2005 dan 9 Mei 2006 di Lembaga Pelabuhan Kelang,Jalan Pelabuhan Utara, Pelabuhan Kelang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan sebagai seorang ejen iaitu Pengurus Besar Lembaga Pelabuhan Kelang dan dalam kapasiti tersebut telah diamanahkan

dengan penguasaan ke atas dana di dalam akaun Disbursement No. 21423100033928 di RHB Bank Berhad, Plaza OSK, Jalan Ampang Kuala Lumpur berjumlah RM134,550,000.00 telah melakukan pecah amanah jenayah berkenaan dengan harta tersebut dan oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

[12] It would be noted that all the three charges ('the criminal charges') are for the offence of criminal breach of trust under s. 409 of the Penal Code ('PC').

[13] D's counsel ('D/C') informed the court that the criminal trial at the Sessions Court in which the prosecution had to date called two witnesses and its second witness ('PW2') was in the midst of the prosecution.

The Law On Stay Of Concurrent Civil And Criminal Proceedings

[14] In the case of *Dato' Ding Lian Cheon v. Yap Yon Jee & Ors* [1999] 8 CLJ 98, the High Court correctly expressed the principle applicable to these issues to be this:

Where there are concurrent civil and criminal proceedings in respect of the same subject matter, the court having control of the civil proceedings could, in the exercise of its discretion, stay those proceedings if it appears to the court that justice so requires, having regard to the defendants' right of silence in relation to the concurrent criminal proceedings.

[15] Further that:

An important factor to be taken into account by the court in deciding whether to grant a stay was whether there was a real and not merely a notional damage that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings.

[16] My attention was also brought to the judgment of the Australian Supreme Court where the factors to be considered were laid down as follows:

(i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (*ibid* at 905);

(j) In this regard factors which may be relevant include:

(i) the possibility of publicity that might reach and influence jurors in the civil proceedings (*ibid* at 905);

(ii) the proximity of the criminal hearing (*ibid* at 905);

(iii) the possibility of miscarriage of justice e.g. by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (*ibid* at 905);

(iv) the burden on the defendant has already disclosed his defence to the allegations (*Caesar v. Somner* at 932; *Re Saltergate Insurance Co Ltd* at 736)

(v) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf *Re Saltergate Insurance Co. Ltd.* at 736-6)

(See also *Philippine Airlines v. Goldair (Aust) Pty Ltd & Ors* [1990] VR 385 at 387-388 as cited in *RHB Bank Bhd v. Tan Khay Guan* [2009] 8 CLJ 612]

Analysis Of Facts

[17] In contending that there are special circumstances warranting the stay order to be granted, the defendant relied on the following instances as summarised in the plaintiff's submission:

(a) The factual matrix is very similar, if not identical, in the civil and criminal proceedings;

(b) The Defendant will lose her basic and inherent right to silence in relation to the concurrent criminal proceedings;

(c) The Defendant's evidence in the civil suit could potentially incriminate her in the court of the criminal proceedings' trial; and

(d) The lack of important documents in the civil suit will seriously prejudice the Defendant's interest.

[18] It was also contended by the defendant that in the event that she loses the above right to remain silent it would be a clear breach of natural justice.

[19] Secondly, that if she were required to disclose her defence in the civil trial, the prosecution at the criminal trial would potentially have the opportunity to tailor the presentation of their case accordingly. Additionally the prosecution would become aware of the testimonies of D's witnesses in this case and would have an unfair advantage in the criminal case.

[20] As such, there was a real and not merely notional, danger of miscarriage of justice to D should this trial commence at this point in time. *Inter alia*, there was a likelihood of extensive publicity being given to both proceedings, causing the risk of potential witnesses in both proceedings to be influenced and/or prejudiced by the disclosure of the evidence.

[21] P, on the contrary, contended that there was no justification for the full trial due, *inter alia*, to these reasons:

(a) There was an inordinate delay by the defendant in filing the stay application;

(b) There is no substantial similarity in the civil suit and the criminal proceedings; and

(c) There is no real prejudice to the defendant.

[22] As a matter of general principle, it is settled law that the power to make an order for stay of proceedings, which would affect a litigant's fundamental right to institute civil proceedings, should be exercised

sparingly and only if exceptional circumstances justify it. It was rightly contended by P that, otherwise, the consequences could be grave and serious to the said right of a litigating party. There is also no known principle that bars civil and criminal proceedings, as in this instance from proceeding concurrently or simultaneously. In the exercise of the court's discretion on this issue, the test is fundamentally whether there was a real risk of serious prejudice and/or injustice should the order of stay not be granted. What the interests of justice require under the given circumstances would be the overriding consideration.

[23] The question that arises in this application is basically whether D on the grounds advanced and facts relied upon, had discharged the burden placed on her to establish that in the circumstances of this case it is just and convenient to order the present proceedings that were commenced in 2009 to be stayed at this juncture.

[24] In the context of this case, where there are concurrent civil and criminal proceedings, D bears the onus of demonstrating that the balance of justice favour the civil proceedings be stayed as against P's inherent right to have its action tried in the ordinary course of civil procedure. In determining the question of balance of justice, the court's task is to take into account all relevant factors and judge the case on its own merits.

(See *Jefferson Ltd v. Bhetcha* [1979] 1 WLR 898 at 904)

[25] First and foremost for determination is the alleged inordinate delay by D in filing the stay application which in principle would be fatal to its success. The stay application was filed about six years after P had instituted the civil suit, which must clearly be regarded as an inordinate delay. It was long after pleadings had closed between P and D and between D and the third parties ('TPs'). As correctly pointed out in P's submission if D felt that her right to remain silent in the criminal trial would be seriously prejudiced, she should have filed the application immediately, whether on or before or after filing her defence. An unexplained delay in applying for a stay is regarded as fatal to the application wherein the court should not exercise its discretion to grant the stay under the circumstances.

(See *MCAT Gen Sdn Bhd v. Celcom (M) Bhd (No 2)* [2007] 10 CLJ 375; [2007] 8 MLJ 107)

[26] In her explanation for the aforesaid delay, D alleged that encl. 79 had only become necessary when the court during case management had issued a direction that interlocutory applications, if any must be filed before the next CM date on 13 May 2015 on which trial dates would be fixed. However, it come to light that on several occasions previously the Registrar had indicated that the court intended to fix trial dates and requested for the free dates of the parties counsel following which trial dates were fixed on at least three occasions as follows:

(a) during the case management on 20 June 2013, trial dates were fixed on 19 and 20 August 2013;

(b) during the case management on 29 January 2014, trial dates were fixed on 19 to 22 May 2014; and

(c) on 30 December 2014, by way of a letter from the court, trial dates were fixed on 26 to 31 March 2015.

[27] It can be seen that the above trial dates, which were subsequently vacated upon the parties' request as the case was not ready for trial stretched from mid 2013 to the end of 2015. Despite the lengthy period for the trial to take off and the fact that criminal charges had been preferred against D, she did not see it fit or necessary to file the stay application. Instead, she chose to do so only after a prolonged delay of more than three years from 20 June 2013.

[28] What is plain and obvious in this instance is that D's explanation for the late filing on encl. 79 is far from credible or convincing and hence unsustainable based on the chronology of events. A delay of approximately six years from the commencement of this civil action is certainly unreasonable under the circumstances alluded to and must be considered as crucial factors in exercising the court's discretion whether to grant the stay sought.

[29] As to the question of substantial similarity between the two proceedings (civil and criminal) the onus was on D to show the substantial overlap between the facts, allegations and reliefs in the statement of claim and the charges brought against the defendant in the criminal proceedings.

[30] In this regard, a minimum overlap would certainly not suffice to make the drastic order of completely staying the trial of the civil claim. To determine the question in issue, a close perusal of the averments in the amended statement of claim ('ASOC') is called for. Upon doing so, it will be observed that the three criminal charges against D are mentioned only in para. 18.1 to 18.2 of the ASOC which relate only to one of the 15 breaches alleged against D. It would also become apparent that the crux of the 15 alleged breaches concern primarily her contractual, fiduciary and/or common law duties during her tenure of general manager of the plaintiff for the period September 1997 to June 2008.

[31] In support of D's contention on this issue reference was made to the Supreme Court case of *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160; [1988] 2 MLJ 184 where it was held *inter alia*:

> It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter.

[32] On the exercise of the court's discretion in the granting of stay on the present situation, D also referred to the *Halsbury's Law of England,* 4th edn vol. 37 where it was stated that:

> The court will not stay pending proceedings on the ground that there is prospective legislation before Parliament which might affect the rights of the parties; and if there are concurrent civil and criminal proceedings against the same defendant arising out of the same matter, the court has a discretion whether to stay the civil proceedings pending the conclusion of the criminal proceedings, taking into account all the circumstances including the defendant's right of silence in the criminal proceedings.

[33] It can be gleaned that the basic element that must be satisfied by D in the present instance is the substantial similarity between the civil and criminal proceedings and the existence of common issue to warrant the exercise of the court's discretion to stay the former.

[34] In my view, it was correctly contended by P that the 15 breaches of contractual, fiduciary and/or common law duties alleged against D in the SOC cover a substantially wider spectrum then the three criminal charges for the offence of criminal breach of trust.

[35] In *Leong Ken Min & Anor v. Pelangi Kurnia Sdn Bhd & Anor* [1999] 1 LNS 156; [2000] 1 MLJ 665 at 671 and 672, the High Court rightly held that:

> … even though the first plaintiff was charged for the offence of cheating which resulted in concurrent civil and criminal proceedings being brought in respect of some facts relevant to the subject matter in this civil suit, the question of whether or not the court should stay the proceedings was clearly a matter at the discretion of this court which had control of the civil proceedings.

[36] In the instant case, D had been able to show, at the most, that some facts in the criminal proceedings may be relevant to the civil suit which would, in principle, be insufficient to justify a stay of proceedings. From a perusal of the facts narrated in the ASOC, it would be apparent that the facts are substantially more than as well as in substance different from, the criminal proceedings.

[37] As regards whether there was an element of real prejudice to D if the stay were not to be granted, the allegation raised by D as summarised in the plaintiff's submission, the following:

> (a) that there is a real risk that she will lose her right to silence in relation to the concurrent criminal proceedings and that her evidence in the civil suit could potentially incriminate her in the criminal proceedings; and
>
> (b) That if the civil suit were to continue to trial, it would be procedurally prejudicial to the Defendant.

[38] In support of the allegation of procedural prejudice, D raised these grounds. A

(a) She would be deprived of her right to material documents to defend the civil claim as the originals would be in the possession of the prosecution in the criminal case;

B

(b) If she was compelled to testify in the civil trial, it would mean disclosing her defence to the criminal charges even before the prosecution had called their witnesses and/or proved its case against he; and

(c) The civil case is bound to generate a lot of publicity in view of the element of public interest in the subject matter of the case. It would C therefore affect the perception of potential witnesses for the prosecution in the criminal case and her defence as well adversely.

[39] In my view, the element of prejudice emanating from the above instances has not been properly established. Instead, the slow progress of the criminal proceedings which the facts clearly disclose could impede the fair D disposal of the civil suit to the plaintiff's prejudice. Although the criminal trial has commenced, only two witnesses have been called to date and subsequent trial date have been vacated for reason unknown. To estimate when the trial would be concluded would be a most difficult task and based on the current progress and postponements, it is likely to take several years. E In the light of this, the question of unfairness and prejudice to the plaintiff in the event that the stay is granted remains as this civil suit was instituted way back in 2009.

[40] I concur with the plaintiff that several other factors in this case militate against the issue of prejudice to the defendant as raised by her. These are, in F summary, as follows:

(a) The ordinate delay of about seven years in the filing of encl. 79 without any reasonable and/or credible explanation.

(b) D had already disclosed her defence in the civil suit as well as her claim G against the TPs *via* the TP's summons for direction and statement of claim.

(c) D's allegation of procedural injustice amounted to no more than averments and mere conjecture. D, *inter alia* had not shown any attempts to procure from the prosecution documents essential and necessary to H her defence nor evidence of refusal by the prosecution to provide her the said documents upon request.

(d) D had since the commencement of this suit filed two separate discovery applications against P which resulted in the latter having to provide the documents sought to the former. The documents are in her possession. I

A She there after filed the re-amended defence and then proceeded to file the SOC against the TPs. Hence, her allegation of not having potentially important documents is devoid of any merits.

[41] P further invoked ss. 147 and 132 of the Evidence Act 1950 which come into operation when the issue arises whether a witness in a civil suit B can be compelled to give evidence at the risk of the answer incriminating himself. Section 147 is of general application to witnesses in a civil suit who are entitled to protection under s. 132 where they are compelled to answer any question relevant to the suit. For ease of reference, s. 132, which provides protection against self-incrimination is reproduced below:

C

> 132. Witness not excused from answering on ground that answer will incriminate.
>
> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that D question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> E
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer ...

F **[42]** In the light of the protection afforded to D by s. 132 should she be required to testify in the civil suit, the question of being exposed to criminal prosecution resulting from the evidence given did not arise at all and had no basis.

Conclusion

G **[43]** Upon having considered the grounds of application, the issues raised and the contentions of both parties together with the affidavit evidence on the circumstances pertinent to the issue at hand, I would conclude as follows.

[44] In principle, in any application of this nature would only be allowed H in special and exceptional circumstances as it would obstruct the right of a litigating party to pursue its claim promptly and expeditiously.

[45] In this case, I agree with the contention of the plaintiff that the defendant has failed to discharge the onus of demonstrating that there are special and/or exceptional circumstances that would justify the court I exercising its discretion to grant the stay that D seeks or that there is a real risk of prejudice or irreparable harm to D if the order is refused. It is clear that the balance of justice tilts in favour of the order not being granted in view of the interference with the right of P to proceed with the suit in the normal

course. *Inter alia* there was obviously an inordinate and unreasonably long delay on P's part in making this application at this belated stage without any reasonable or credible explanation for the same. Any further delay in the prosecution of this suit would likely result in serious prejudice and irreparable harm to P.

[46] Further, on the facts and evidence, this attempt to stay the trial has not been shown to be *bona fide* as there is clearly no substantial similarity between this civil suit and the pending criminal action against D that would pose a real and substantial prejudice or risk to her in the latter proceedings. This is apart from the manifestly inordinate delay in bringing this application without any sufficient explanation and/or justification.

[47] In the light of the above, I find that, on the grounds advanced and all the relevant circumstances alluded to, this application has no merits on the facts and in principle and is dismissed with costs to be fixed at the conclusion of the proceedings.